A

Asmah bt Ahmad & 150 Ors v FELCRA Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–2749 OF 2010
ABDUL WAHAB PATAIL, ZAWAWI SALLEH AND HAMID SULTAN JJCA
22 APRIL 2015

C

Evidence — Burden of proof — Whether plaintiff seccessfully discharged its burden — Whether witness's testimony automatically discharged burden of proof

D *Evidence — Witness — Cross-examination — Witness not tested by cross-examination — Whether plaintiff's burden of proof discharged*

The appellants appealed against the dismissal of their claim against FELCRA Bhd, Kerajaan Negeri Sembilan and the Pengarah Tanah dan Galian Negeri Sembilan. The appeal was pursued against FELCRA Bhd ('the respondent'). The respondent was the development authority to develop under the Land (Group Settlement Areas) Act 1960, a project developed from the year 1982 to 2002 and known as 'Rancangan Tanah Pinggir Felcra Rompin A' ('the project') in Negeri Sembilan for settlers, including the appellants. An agreement was entered into with each settler in 1982 where it was agreed that the respondent was responsible for managing the development, maintenance and accounts of the project; and the respondent was responsible for the funding and expenditure of the operation and management of the project. The core of the appellants' case was that the respondent had mismanaged the accounts, made unjustified and unnecessary deductions for expenses not expended on the project. In the present appeal, the respondent submitted that the mere fact of a witness testifying without his evidence being controverted did not automatically mean that the appellants had discharged the burden of proving their claim.

H

Held, allowing the appeal in part with costs for here and below at RM30,000:

(1) While the agreement stated that the settlers were to be given a lease for a term of not more than 99 years, no mention was made that the area allocated was to be six acres. Clause 17 provided that the state authority shall, for the purpose of enabling the rehabilitation authority to meet the expenditure to be incurred in operating the factories for processing the produce of the land so revested and in respect of other facilities provided, alienate to the rehabilitation authority a portion of the land so revested not exceeding ten per centum thereof (see para 18).

(2) However, there was little support from cl 17 for the proposition the respondent was entitled to 10% for the reason that the purpose for the allocation was specified to be 'for the purpose of enabling the rehabilitation authority to meet the expenditure to be incurred in operating the factories for processing the produce of the land so revested and in respect of other facilities provided'. The expenditure would need first to be determined, or an estimate accepted, so as to determine the acreage to be allocated because the term is 'not exceeding ten per centum thereof'. There was no support for any interpretation other than that there was no automatic entitlement to 10% (see para 19).

(3) There was no evidence adduced of the value of the 120 acres as being the amount or estimate of the amount needed to meet the expenditures stated in cl 17. That there would be any such amount was not dealt with and remains puzzling in light of the fact that all expenditures were to be recovered from revenues in order to determine the profits (see para 20).

(4) The respondent failed to demonstrate that the appellants had failed to prove its case upon a balance of probabilities based on the detailed and particularised pleadings by the appellants; the evidence of SP1 and of contemporaneous documents weighed against; the absence of applications for further and better particulars, meaning that the respondent had ample notice of the case against it; and the failure to positively address, answer and dispose of the assertions by the plaintiffs (see para 24).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap penolakan tuntutan mereka terhadap FELCRA Bhd, Kerajaan Negeri Sembilan dan Pengarah Tanah Dan Galian Negeri Sembilan. Rayuan diburu terhadap FELCRA Bhd ('responden'). Responden adalah autoriti pembangunan untuk membangunkan di bawah Akta Tanah (Kawasan Penempatan Berkelompok) 1960, projek yang dibangunkan dari tahun 1982 ke 2002 dan dikenali sebagai 'Rancangan Tanah Pinggir Felcra Rompin A' ('projek') di Negeri Sembilan untuk peneroka-peneroka, termasuk perayu-perayu. Perjanjian dimasukkan dengan setiap peneroka pada tahun 1982 di mana ia dipersetujui bahawa responden bertanggungjawab untuk menguruskan pembangunan, penyelenggaraan dan akaun-akaun projek tersebut; dan responden bertanggungjawab untuk pembiayaan dan perbelanjaan operasi dan pengurusan projek tersebut. Teras kes perayu adalah bahawa responden telah salah urus akaun-akaun, membuat penolakan yang tidak berjustifikasi dan tidak perlu untuk perbelanjaan yang tidak dibelanjakan atas projek tersebut. Dalam rayuan ini, responden berhujah bahawa fakta semata-mata saksi memberi keterangan tanpa keterangannya dipertikaikan tidak secara automatik bermaksud bahawa perayu-perayu telah melepaskan beban untuk membuktikan tuntutan mereka.

Diputuskan, membenarkan sebahagian rayuan dengan kos di mahkamah ini and Mahkamah Tinggi pada RM30,000:

(1) Sementara perjanjian menyatakan bahawa peneroka-peneroka diberikan pajakan untuk tempoh tidak lebih daripada 99 tahun, tiada sebutan dibuat bahawa kawasan yang diperuntukkan adalah enam ekar. Klausa 17 memperuntukkan bahawa pihak berkuasa negeri akan, bagi tujuan membolehkan lembaga pemulihan untuk membayar perbelanjaan yang ditanggung dalam menjalankan kilang-kilang untuk memproses hasil tanah yang terletakkan hak semula dan berkaitan kemudahan-kemudahan lain yang diperuntukkan, mengalihkan kepada lembaga pemulihan sebahagian tanah yang terletakkan hak semula tidak melebihi 10% daripadanya (lihat perenggan 18).

(2) Walau bagaimanapun, terdapat sedikit sokongan daripada klausa 17 untuk cadangan responden berhak kepada 10% bagi alasan bahawa tujuan untuk peruntukan ditetapkan menjadi 'for the purpose of enabling the rehabilitation authority to meet the expenditure to be incurred in operating the factories for processing the produce of the land so revested and in respect of other facilities provided'. Perbelanjaan pertama sekali perlu ditentukan, atau anggaran diterima, untuk menentukan keluasan yang diperuntukkan kerana terma adalah 'not exceeding ten per centum thereof'. Tidak terdapat sokongan untuk apa-apa tafsiran selain daripada bahawa tidak terdapat hak automatik kepada 10% (lihat perenggan 19).

(3) Tidak terdapat keterangan yang dikemukakan mengenai nilai 120 ekar sebagai jumlah atau anggaran jumlah yang diperlukan untuk membayar perbelanjaan yang dinyatakan dalam klausa 17. Bahawa akan terdapat apa-apa jumlah yang tidak diuruskan dan masih menjadi teka teki berdasarkan fakta bahawa kesemua perbelanjaan akan diperolehi semula daripada hasil untuk menentukan keuntungan (lihat perenggan 20).

(4) Responden gagal untuk menunjukkan bahawa perayu-perayu telah gagal untuk membuktikan kesnya atas imbangan kebarangkalian berdasarkan pliding terperinci dan dikhususkan oleh perayu-perayu; keterangan SP1 dan dokumen-dokumen semasa yang dipertimbangkan; ketiadaan permohonan untuk butir-butir lanjut dan lebih baik, bermaksud bahawa responden mempunyai notis yang mencukupi kes terhadapnya; dan kegagalan untuk menanganinya secara positif, menjawab dan melepaskan penegasan-penegasan oleh plaintif-plaintif (lihat perenggan 24).]

Notes

For a case on whether plaintiff seccessfully discharged its burden, see 7(1) *Mallal's Digest* (5th Ed, 2015) para 1030.

For a case on cross-examination of witness, see 7(3) *Mallal's Digest* (5th Ed, 2015) para 3445.

Cases referred to

Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, PC (refd)
Liza bte Ismail v PP [1997] 2 SLR 454, HC (refd)

Legislation referred to

Federal Constitution art 87
Land (Group Settlement Areas) Act 1960

Appeal from: Civil Suit No 22–230 of 2002 (High Court, Seremban)

Manian Raju (Gurdit Singh and Zatul Izra bt Zulkefelee with him) (Sharif & Khoo) for the appellants.
Abu Daud Abd Rahim (Azmi & Assoc) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The plaintiffs Asmah bt Ahmad & 150 Ors ('the appellants') appealed against the dismissal of their claim against FELCRA Bhd, Kerajaan Negeri Sembilan and the Pengarah Tanah dan Galian Negeri Sembilan. The appeal was pursued against FELCRA Bhd ('the respondent').

[2] By their writ of summons, the appellants had sought:

1. Wang RM 1,223,809–55 tersebut;
2. Baki Dividen Hari Raya bagi tahun 1999 dalam jumlah wang RM500,778.49;
3. Defendan memberi suatu akaun tentang semua hasil jualan dan perbelanjaan yang dikenakan berkenaan dengan pengurusan Kawasan Rancangan itu termasuk semua penyata-penyata pendapatan dan perbelanjaan dari tahun 1982 sehingga tahun 2002;
4. Defendan memberi suatu akaun untung bersih yang terakru berkenaan dengan hasil jualan tanaman getah Kawasan Rancangan itu dari tahun 1982 hingga tahun 2002;
5. Defendan memberi suatu akaun tentang semua kos perbelanjaan ke atas 165 ekar yang di tanam dengan kelapa sawit dari tahun 1982 hingga tahun 2002;
6. Defendan memberi suatu akaun tentang semua kos bayaran tahunan lebihan yang dikenakan ke atas 165 ekar tersebut dari tahun 1982 hingga tahun 2002;

7. Defendan membayar kepada Plaintif-Plaintif semua wang yang didapati kena dibayar kepada Plaintif-Plaintif setelah mengambil akaun-akaun tersebut;

8. Faedah atas semua wang yang kena dibayar kepada Plaintif-Plaintif pada kadar 8% setahun bermula dari 1/1/1983 sehingga penyelesaian penuh;

9. Kos tindakan ini; dan

10. Relief lain atau lanjut yang Mahkamah Mulia ini fikir adil atau sesuai.

[3] Having heard the parties upon their submissions, this court allowed the appeal in part and entered judgment in terms of prayer 1, 2 and 8 with agreed costs for here and below at RM30,000. We ordered the deposit be refunded.

BACKGROUND

[4] The respondent is the development authority to develop under the Land (Group Settlement Areas) Act 1960, a project developed from the year 1982 to 2002 and known as 'Rancangan Tanah Pinggir Felcra Rompin A' ('the project') in Negeri Sembilan for settlers. The settlers include the appellants.

[5] An agreement was entered into with each settler in 1982. The case for the appellants was that it was agreed:

(a) the respondent was responsible for managing the development, maintenance and accounts of the project;

(b) the respondent was responsible for the funding and expenditure of the operation and management of the project:

(i) to make all the necessary deductions from the proceeds of the project;

(ii) to recover all the expenses incurred for the project as well as repay the initial funding provided by the federal government and advances by the respondent, and balance to be paid to the appellants; and

(iii) to pay dividends to the appellants, and subject to reimbursement from the project, even when actual revenue was insufficient.

[6] The core of the appellants' case was that the respondent had mismanaged the accounts, made unjustified and unnecessary deductions for expenses not expended on the project.

THE APPEAL

[7] The grounds of appeal pursued in submissions were that the High Court failed to consider:

(a) that Alis bin Abdul Rahman ('SP1') was not cross-examined nor was his evidence challenged concerning the facts that proved the appellants' claim against the respondent;

(b) Mohd Yusof bin Mohd, the maker of the letter dated 6 October 1997 containing an admission by the respondent (to the appellants) concerning the adjustment of the P & L account from 1990 to 1996 was not called to explain away the letter;

(c) failed to consider the following contemporaneous documents:

(i) the letter dated 6 October 1997;

(ii) the income and expense statement of account dated 31 December 1998;

(iii) the land development cost details as at 31 December 1997;

(iv) the letter dated 10 April 2002;

(d) failed to consider that the respondent, having control and possession of all the documents concerning the administration, management and accounting of the 'Rancangan Tanah Pinggir Felcra Rompin A' ('the Rompin A Project') had failed to produce the said documents.

DECISION

[8] We examined the grounds of the High Court.

[9] Between pp 2 and 14 of its grounds, the High Court summed up at length the plaintiffs' case in Civil Suit 22–230 of 2002. The defence case was summed up between pp 14 and 16. Its consideration and finding was set out between pp 17 and 19. The High Court referred to *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC) that ' ... 'legitimate expectation' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis'. Then referred to para 4 of exh D8, where it was stated 'setiap peserta telah ditetapkan untuk mendapat enam ekar tanah seorang'. Holding that the legitimate expectation was for six acres and not 7.541 acres, the High Court dismissed the plaintiffs' claim.

[10] Civil Case 22–22 of 2003 concerned a claim that the respondent failed to keep and manage accounts of income and expenditures, causing loss to the plaintiffs.

[11] The sole ground for dismissal by the High Court is contained in the following:

> Sehubungan dengan ini satu-satunya keterangan yang dikemukakan oleh plaintif-plaintif untuk menyokong dakwaan di atas ialah melalui testimoni SP1. Namun penelitian terhadap keterangan saksi ini tidak langsung dapat membantu membuktikan dakwaan yang diplidkan di dalam penyataan tuntutan berkenaan.
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> Seksyen 101 Akta Keterangan 1950 menyatakan ' ... whoever desires any court to give judgment as to any legal right liability, dependant on the existence of facts which he asserts, must prove that these facts exist'. Sehubungan dengan ini apa yang diberitahu oleh SP1 didalam keterangannya di Mahkamah ini tidak secara nyata membuktikan dakwaan sebarang kecuaian, salahlaku, atau ketinggalan oleh Defendan didalam mengurus dan menyediakan akaun berkenaan. Justeru itu adalah diputuskan bahawa Plaintif telah gagal membuktikan kes mereka terhadap Defendan.

[12] The grounds failed to set out the limitations of the evidence of SP1 which led the High Court to the conclusion that his evidence did not support or prove the plaintiffs' case.

[13] The statement of claim was detailed and particularised. The statement of defence was largely denial and putting the plaintiffs to strict proof. Nowhere in the statement of defence was the point made that the plaintiffs were only to receive six acres each, not 7.541 acres being 1,199.5 acres distributed equally amongst the 159 registered members.

[14] As to the evidence, nowhere is it stated in the agreement between the respondent and the settler that he is to be allocated six acres only. It is stated the respondent had selected the settler to participate in the project and is entitled to one share. The agreement between the state government and the respondent states clearly that the settler is accepted to occupy in expectation of title.

[15] It was submitted for the respondent before this court that the mere fact of a witness testifying without his evidence being controverted does not automatically mean that the appellants had discharged the burden of proving their claim. In our view, *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454 only served to illustrate that the questions of uncontroverted evidence and sufficient evidence to prove a case are two separate matters. Proof upon a balance of probabilities means that within the evaluation of the case as a whole, there is the consideration of the pleaded case, and in respect of disputed facts,

the evidence of each party, in determining whether the plaintiff had proved its case upon a balance of probabilities.

[16] The letter dated 4 October 1997 by one Mohd Yusoff bin Mohd, the Manager of FELCRA Bhd Gugusan Rompin, Negeri Sembilan to the Chief Executive of FELCRA Bhd is amply demonstrated that there were errors in the profit and loss accounting resulting, in the words of the conscientious manager:

> Keadaan ini menjejaskan bayaran balik kos pembangunan dan merugikan peserta-peserta projek ini.
>
> Kerjasama tuan dalam perkara ini sangat-sangat diharapkan demi menjaga reputasi dan maruah pentadbiran FELCRA dari kacamata peserta-peserta. Pentadbiran gugusan Rompin juga memohon kemaafan atas kesilapan ini.

[17] There was no evidence adduced that the manager had erred. The witness for the respondent Azizi bin Ayob ('SD1'), the Penolong Pentadbir Tanah in Pejabat Daerah dan Tanah Jempol, who was appointed to the post on 18 June 2007 testified as to the agreement made on 30 January 1982 between Felcra and the State Government of Negeri Sembilan. He testified that the land identified measured 1199.05 acres, that 10% or 120 acres were allocated to the respondent while each settler was allocated six acres. He testified that the respondent was authorised by a Majlis Mesyuarat Kerajaan decision made on 16 October 1982 that a balance of ten unallocated lots of six acres each could be allocated to new applicants following established procedure.

[18] While the agreement dated 30 January 1982 stated that the settlers were to be given a lease for a term of not more than 99 years, no mention was made that the area allocated was to be six acres. It is true, however, that cl 17 provided that the state authority shall, for the purpose of enabling the rehabilitation authority to meet the expenditure to be incurred in operating the factories for processing the produce of the land so revested and in respect of other facilities provided, alienate to the rehabilitation authority a portion of the land so revested not exceeding ten per centum thereof.

[19] We find little support from cl 17 for the proposition the respondent was entitled to 10%, ie120 acres for the reason that the purpose for the allocation was specified to be 'for the purpose of enabling the rehabilitation authority to meet the expenditure to be incurred in operating the factories for processing the produce of the land so revested and in respect of other facilities provided'. It would mean that the expenditure would need first to be determined, or an estimate accepted, so as to determine the acreage to be allocated because the term is 'not exceeding ten per centum thereof'. We find no support for any interpretation other than that there was no automatic entitlement to 10%.

[20] No evidence was adduced of the value of the 120 acres as being the amount or estimate of the amount needed to meet the expenditures stated in cl 17. That there would be any such amount was not dealt with and remains puzzling in light of the fact that all expenditures were to be recovered from revenues in order to determine the profits.

[21] We noted cl 18 to refer any question or difference to the Land Tribunal constituted under art 87 of the Federal Constitution for arbitration. However, that is a clause applicable between the respondent and the state government and does not bind the appellants who were not parties to the 30 January 1982 agreement.

[22] As regards the second prayer, it is common ground that of the dividend of RM608,728.49 in the account, only RM108,000 was paid out. The testimony of SP1 at QA 25 of his witness statement was not challenged. There was, therefore, a balance of RM500,778.49. The point was made in QA 26 and QA 27 and was not challenged in cross-examination.

[23] We conclude that given:

(a) the weak statement of defence of largely denial and putting the plaintiffs to strict proof despite the fact the pleaded claim was detailed and particularised;

(b) the respondent had control and possession of all the records to answer and dispose of the assertions in the statement of claim;

(c) despite the unexplained conclusion by the High Court all that was submitted for the respondent was upon general principle and that the High Court has considered the evidence of SP1, the contemporaneous documents referred to by the appellants were adduced through SP1, and the High Court had considered the documents adduced through SP1 in the findings relating to the first suit;

we hold that the evidence and the case for the respondent is weak and does not outweigh the evidence of SP1 and the contemporaneous documents that was adduced through SP1.

[24] Put another way, we hold that:

(a) the detailed and particularised pleadings by the appellants;

(b) evidence of SP1 and of contemporaneous documents weighed against;

(c) the absence of applications for further and better particulars, meaning that the respondent had ample notice of the case against it; and

(d) the failure to positively address, answer and dispose of the assertions by the plaintiffs;

lead us to hold that the respondent failed to demonstrate that the plaintiffs had failed to prove its case upon a balance of probabilities.

[25] We, therefore, allowed the appeal as set out in para 3 above.

Appeal allowed in part with cost here and below at RM30,000.

Reported by Afiq Mohamad Noor